

DANAHARTA MANAGERS SDN BHD

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v.

TSANG & ONG STOCKBROKERS PTE LTD

HIGH COURT MALAYA, KUALA LUMPUR

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VINCENT NG J

[SUIT NO: D1-22-2134-2001]

19 APRIL 2004

CIVIL PROCEDURE: *Service - Out of the jurisdiction - Service of notice of writ on company abroad - Principles and application - Service in accordance with the law of the country in which service is effected - Rules of the High Court 1980, O. 11 rr. 5(3), 6(2) - Companies Act 1988 [Sing], s. 387*

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The plaintiff (which is suing the defendant for various losses and share-transaction charges amounting to RM55 million) had obtained the leave of the court to issue a notice of writ to be served out of the jurisdiction on 18 February 2002. A notice of writ for service out of the jurisdiction was then filed on 26 April 2002 ('encl. 5'). Thereafter, the plaintiff filed an affidavit of service exhibiting the affidavit of service of one Chew Chin Heng ('CCH') who was a process-server in Singapore. CCH had averred that encl. 5 was served by leaving a copy of the same at the defendant's registered address at "No. 80 Robinson Road, #02-00 Singapore" at 11am on 5 August 2002. Subsequently, on 2 September 2002, the defendant sought and obtained the leave of the court to file a conditional appearance and an application to set aside encl. 5. It was contended that the service of encl. 5 on the defendant was defective under the laws of Singapore; and, hence, as there was no due and proper service in accordance with O. 11 of the Rules of the High Court 1980 ('RHC'), the judicial power of the High Court should not and could not be invoked in Singapore.

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The instant appeal was from the decision of the senior assistant registrar dismissing the defendant's application to set aside encl. 5.

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Held (dismissing the defendant's appeal):

[1] It was not at all disputed by the defendant that encl. 5 was served on it at its registered address. Indeed, the plaintiff had served encl. 5 on the defendant "by leaving it at ... the registered office of the company" – in accordance with s. 387 of the Companies Act 1988 [Sing]. Thus, as the plaintiff had complied with s. 387 of the Companies Act 1988 [Sing], it had, in turn, also satisfied O. 11 r. 5(3) of the RHC. (pp 879 a-h & 880 a)

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- a* [2] Contrary to its assertions, the defendant was unable to show that CCH was not the person who effected service of encl. 5. On the other hand, the essence of CCH's evidence that he was the person who had effected service of encl. 5 remained intact and unimpaired. (p 880 b-f)

b **Legislation referred to:**

Rules of the High Court 1980, O. 11 rr. 5(3), 6(2)

Companies Act 1988 [Sing], s. 387

Rules of Court 1997 [Sing], O. 10 r. 1(1)

c *For the appellant/defendant - Ong Chee Kwang (Lewis Lim); M/s Lee Ong & Kandiah*

For the respondent/plaintiff - Amer Hamzah Arshad (SA Kok); M/s Zain & Co

Reported by Gan Peng Chiang

JUDGMENT

d **Vincent Ng J:**

Preamble

e Before me is the defendant's appeal (encl. 36) against the decision of the learned senior assistant registrar (SAR) dated 5 September 2002, dismissing their application to set aside the service of the notice of writ for service out of the jurisdiction dated 26 April 2002.

Background Facts

f Before going on to consider the merits of the defendant's appeal, a review of the facts of this case would be useful.

g The plaintiff's claim against the defendant is for losses and miscellaneous share-transaction charges amounting to RM55,020,772.89. On 18 February 2002, the plaintiff obtained leave of court to issue a writ notice of which is to be served out of jurisdiction and to serve the same out of jurisdiction. The notice of writ for service out of jurisdiction was filed on 26 April 2002 (encl. 5). The defendant's place of business and registered address at the material time was No: 80 Robinson Road #02-00 Singapore. The plaintiff then filed an affidavit of service exhibiting the affidavit of service of one Chew Chin Heng (Chew) (exh. KSA 1 encl. 8), a process server in Singapore. Chew averred that encl. *h* 5 was served by leaving a copy of the same at the defendant's registered address at No: 80 Robinson Road #02-00 Singapore on 5 August 2002 at 11am.

On 2 September 2002, the defendant sought and obtained leave of court to file their conditional appearance and the application to set aside encl. 5.

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The Rules Pertaining To Service Out Of Jurisdiction

The defendant's application is premised on the sole ground that the service of encl. 5 on them was defective under the laws of Singapore. As there was no due and proper service of encl. 5 in accordance with O. 11 of the Rules of the High Court (RHC) 1980, the defendant maintains that the judicial power of this court should not and could not be invoked in Singapore.

The application called for this court to examine the provisions relating to the service of a notice of writ outside jurisdiction in both Malaysia and Singapore.

Order 11 r. 5(3) RHC 1980 provides that:

A notice of writ which is to be served out of the jurisdiction need not be served personally on the person required to be served so long as it is served on him in accordance with the law of the country in which service is effected.

Order 11 r. 6(2) RHC 1980 reads:

Where in accordance with these rules notice of a writ is to be served on a defendant in any country with respect to which there does not subsist a Civil Procedure Convention providing for service in that country of process of the High Court, **the notice may be served:**

- (a) ...;
- (b) except where service through a consular authority or by the plaintiff or his agent is prohibited by the law of the country:
 - (i) through a Malaysian Consular authority in that country; or
 - (ii) by the plaintiff or his agent.

Order 10 r. 1(1) of the Rules of Court 1997 [Sing] states:

Subject to the provisions of any written law and these Rules, a writ must be served personally on each defendant.

And finally, s. 387 of the Companies Act 1988 [Sing] provides that:

A document may be served on a company by leaving it at or sending it by registered post to **the registered office of the company.** (emphasis added)

The Service

It is noteworthy that the defendant did not deny that encl. 5 was served on them ('left at the registered office' in the words of their own counsel) at their registered address at No: 80 Robinson Road #02-00 Singapore. The notice of writ being so served, I would hold that as the plaintiff had complied with s. 387 of Companies Act [Sing] the plaintiff had in turn also complied with

- a* the stipulation in our O. 11 r. 5(3) that such notice has to be served ‘in accordance with the law of the country in which service is effected’. Their sole objection to the service of encl. 5 is that it was served by a Malay man and not Chew, as maintained by the plaintiff. The plaintiff denied this averment. To ferret out the truth about the service of encl. 5, the defendant obtained an order to cross-examine Chew.
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The defendant made heavy weather of Chew’s failure to get the defendant’s receptionist to acknowledge or endorse receipt of encl. 5 by affixing the defendant’s chop on his copy of encl. 5. This, they alleged just went to show that Chew was not the person who effected service of encl. 5. The plaintiff vehemently denied this allegation. It is trite law that the burden of proof lies on the defendant and their failure to get their unidentified receptionist to affirm an affidavit as to what transpired on 5 August 2000 at 11am at their registered office gives rise to an adverse inference against them.

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The defendant had also submitted that despite professing not knowing Bahasa Malaysia, Chew’s ability to endorse particulars of the service in that language was suspect. I accept the plaintiff’s simple explanation for Chew’s “sudden proficiency in Bahasa Malaysia”. Chew endorsed the particulars of the service in English and forwarded the same to the plaintiff’s solicitors in Kuala Lumpur. The plaintiff’s solicitors returned the document to Chew with a request for him to make a similar endorsement in Bahasa Malaysia, the translation of which was provided to him.

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I find that all the other alleged discrepancies the defendant found in Chew’s testimony are trivial in nature. When considering the entirety of Chew’s testimony, they do not render the whole of his evidence unacceptable or make him an unreliable witness. Hence, the essence of his evidence that he was the person who had in fact effected the service remain intact and unimpaired.

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The learned SAR who presided over the cross-examination of Chew had the benefit of seeing and observing the manner and demeanor in which he answered the questions put to him. The findings of the learned SAR *vis-à-vis* the evidence given by Chew is a question of fact, and she obviously found him to be a truthful witness and accepted his evidence that he was the process server who effected service of encl. 5 on the defendant. In my view, the same guiding principle that an appellate court applies when dealing with the question of veracity of a *viva voce* witness in the court below is equally applicable in the case of such witness who is cross-examined and re-examined before the senior assistant registrar. The principle being that the higher or appellate court should not interfere with the finding of fact by the decider who has had the opportunity

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to observe the witness, unless the decider has misdirected himself or herself on the facts or on the law or has taken extraneous or irrelevant matters into consideration on the finding of fact. Having studied the recorded evidence in the light of this principle, I see no reason to interfere with her finding of fact. *a*

Conclusion

After careful consideration of the application, the affidavits and the submissions by both sides, I decided to dismiss the defendant's appeal in encl. 36 with costs. *b*

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